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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of Beth A. Lange

Art Unit 3728

Serial No. 10/741,678

Filed December 19, 2003

Confirmation No. 4168

For PRE-PACKAGED ABSORBENT ARTICLE AND SUN PROTECTION

ACCESSORIES ARRANGEMENT

Examiner David T. Fidei

**APPEAL BRIEF**

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**TABLE OF CONTENTS**

I.	REAL PARTY IN INTEREST .....	1
II.	RELATED APPEALS AND INTERFERENCES .....	1
III.	STATUS OF CLAIMS .....	1
IV.	STATUS OF AMENDMENTS .....	2
V.	SUMMARY OF CLAIMED SUBJECT MATTER .....	2
VI.	GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL .....	3
VII.	ARGUMENT .....	3
VIII.	CONCLUSION .....	9
	CLAIMS APPENDIX.....	10
	EVIDENCE APPENDIX.....	12
	RELATED PROCEEDINGS APPENDIX.....	13

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September 26, 2007

## APPEAL BRIEF

This is an appeal from the final rejection of the claims of the above-referenced application made in the final Office action dated May 23, 2007. A Notice of Appeal was filed on July 27, 2007.

## I. REAL PARTY IN INTEREST

The real party in interest in connection with the present appeal is Kimberly-Clark Worldwide, Inc. of 401 N. Lake Street, Neenah, Wisconsin 54957-0349, a corporation of the state of Delaware, owner of a 100 percent interest in the pending application.

## II. RELATED APPEALS AND INTERFERENCES

Appellant is unaware of any pending appeals or interferences which may be related to, directly affect or be directly affected by, or have a bearing on, the Board's decision in the pending appeal.

### III. STATUS OF CLAIMS

Claims 15, 20-23, 28, and 29 are currently pending in the application for consideration. Claims 2-5, 7-14, 18, 19, and 24-26 are withdrawn from consideration and claims 1, 6, 16, 17,

27 were cancelled during prosecution of this application. A copy of the claims involved in this appeal appears in the Claims Appendix of this Brief.

Claims 15, 20-23, 28, and 29 stand rejected.

The rejections of claims 15, 23, 28, and 29 are being appealed.

**IV. STATUS OF AMENDMENTS**

No amendments have been filed after the final rejection.

**V. SUMMARY OF CLAIMED SUBJECT MATTER**

The following summary correlates claim elements to specific embodiments described in the application specification, but does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

With reference to the present specification and drawings, claim 29 is directed to a pre-packaged absorbent article and sun protection accessories arrangement. See page 13, paragraph [0051] and Figs. 4 and 5. The pre-packaged arrangement comprises an absorbent article 20 for personal wear and a sunscreen carrier 202 containing a sunscreen composition. See page 13, paragraph [0051] and Figs. 4 and 5. The sunscreen carrier 202 is releasably adhered directly to the absorbent article 20 for distribution together as a single unit. See page 13, paragraph [0051] and Figs. 4 and 5.

**GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

A. Appellant appeals the rejections of claims 15, 23, 28, and 29 under 35 U.S.C. §103(a) as being obvious over U.S. Patent No. 4,221,221 (Ehrlich) in view of U.S. Patent No. 6,622,856 (Gallo et al.).

**VII. ARGUMENT**

Claim 29 is generally directed to a pre-packaged arrangement comprising two wholly unrelated products: an absorbent article for personal wear; and a sunscreen carrier containing sunscreen adhered to the absorbent article for distribution together as a single unit. Neither Ehrlich nor Gallo et al. teach or suggest such a pre-packaged arrangement. As a result, claim 29 and the claims depending therefrom are submitted to be non-obvious in view of and patentable over Ehrlich and Gallo et al.

As noted in the background of the present application, it is important for caregivers to take various accessories along on outdoor activities, such as swimming or other outings, to provide protection (e.g., such as sunscreen) for infants/toddlers against UV radiation. Typically, when the caregiver is preparing for such an outing, the caregiver commonly loads the personal wear absorbent articles (e.g., diapers, training pants, swimming pants, etc.) along with all of the needed accessories into a bag or other carrier. This, however, requires the caregiver to remember to purchase, store, and gather all of the separate items together into the carrier. More importantly, even where the caregiver remembers to bring sunscreen the caregiver may forget to apply the sunscreen to the infant.

The pre-packaged arrangement recited in claim 29 solves the problem of remembering to apply sunscreen to the infant by packaging the personal wear absorbent article and the sunscreen carrier together for distribution of the arrangement as a single unit, e.g., at the initial point of purchase. This reduces the burden on the caregiver to have to remember to purchase these items separately and then later also remember to gather these items together to take on an outdoor activity. Rather, these items are already packaged together upon initial purchase and remain together. Thus, when the caregiver takes the personal wear absorbent article along on an outdoor activity, the sunscreen is already there with the absorbent article.

More notably, when the caregiver goes to change the infant while on an outing, having the sunscreen carrier secured to the absorbent article provides an instant reminder to the caregiver to apply sunscreen to the infant. That is, releasably securing the sunscreen to the absorbent article serves as a reminder to the caregiver, upon changing the absorbent article, to apply/reapply sunscreen to the child.

In all general respects, the absorbent article and sunscreen are otherwise two unrelated products in that they are in no way dependent on each other for use. The absorbent article, on one hand, is used to contain and absorb body exudates exuded by the wearer. The sunscreen, on the other hand, is provided to protect the wearer's skin from ultraviolet (UV) radiation. The absorption of body exudates and the protection of the user's skin from UV radiation are wholly unrelated. Accordingly, the claimed pre-packaged arrangement is directed to two independent, wholly unrelated products: an absorbent article and sunscreen.

Specifically, claim 29 is directed to a pre-packaged absorbent article and sun protection accessories arrangement. The pre-packaged arrangement comprises:

an absorbent article for personal wear; and

a sunscreen carrier containing a sunscreen composition, the sunscreen carrier being releasably adhered directly to the absorbent article for distribution together as a single unit.

Claim 29 is submitted to be nonobvious in view of and patentable over the references of record, and in particular Ehrlich in combination with Gallo et al., in that these references fail to teach or suggest to one skilled in the art a pre-packaged arrangement comprising a sunscreen carrier releasably adhered directly to an absorbent article for distribution together as a single unit.

Ehrlich, with reference to Fig. 1 thereof, discloses a diaper 12 having a container assembly 16 adhesively secured to the diaper. The container assembly 16 includes a powder packet assembly 42, a towel packet assembly 44, and a baby oil packet assembly 46. Ehrlich broadly refers to these items as "baby maintenance items". Notably, each of these baby maintenance items (powder, towels, and baby oil) is used by caregivers during diaper changes. Because these items are related to and even more so essential to the changing process, it is unlikely that the caregiver would forget to use these items during the changing process. Rather, Ehrlich's securement of such items to the absorbent article is intended as a convenience feature.

Nowhere does Ehrlich teach or suggest releasably securing, onto the diaper, any products that are wholly unrelated to the diaper and the diaper changing process, let alone sunscreen as recited in claim 29. In particular, it would not suggest to one skilled in the art to solve the problem of reminding the

caregiver to apply sunscreen to an infant by securing a sunscreen carrier to an absorbent article primarily because the sunscreen carrier is wholly unrelated to the changing process.

The Examiner in the Response to Arguments section of the Final Office action improperly expands the teaching of Ehrlich beyond its disclosure. See paragraph 6, pages 3-5 of the final Office action. Specifically, the Examiner contends that Ehrlich discloses the placement of "baby maintenance items" of a diaper and that these "baby maintenance items" can include sunscreen. But nowhere does Ehrlich teach or suggest that the baby maintenance items can be anything except items (e.g. towels, baby powder, baby oil) commonly used during the diaper changing process. Clearly, Ehrlich's disclosure does not encompass items wholly unrelated to the diaper changing process (e.g., sunscreen) as potential items for placement within one of the container members secured to the diaper. Thus, the Examiner's position is unsupported by Ehrlich's disclosure.

Gallo et al. adds little to Ehrlich and in particular represents no more than the state of the art prior to the present invention. In particular, Gallo et al. disclose a relief kit that contains multiple items used for relieving children from discomfort. The kit includes a container 4 having a plurality of interior compartments 5 for holding products for relieving infants from discomforts, e.g., colds, pain, fever, diaper rash, and gas. See column 5, lines 30-35. The container 4 can also contain other related products such as antibiotic ointments, lubricants, saline drops, powder, syrup of Ipecac, bandages, nail clippers, anti-inflammatory creams, thermometer strips, cotton balls, rubbing alcohol, cotton swabs, **sunscreen**, insect repellent, baby oil, instant ice packs, hydrogen peroxide, Aloe Vera for soothing sunburn, and solutions for

replacing electrolytes. See column 5, lines 20-29. Gallo et al. disclose that the comforting products, which may or may not be distributed with the container, can be supplemented with other miscellaneous products, which are not distributed with the container. For example, Gallo et al. teach that the user may place brushes, diapers, wipes, diaper disposal bags, pacifiers, cups, bottles, and the like in ancillary compartments of the container to customize its contents. See column 3, lines 37-40 and column 4, lines 10-13.

One skilled in the art would not be motivated by Gallo et al. or by Ehrlich to replace the diaper related container assemblies secured to the diaper of Ehrlich with sunscreen (which is wholly unrelated to the function of a diaper or the process of changing the diaper). In the same manner that the caregiver prior to the present invention was required to 1) remember to pack the absorbent articles for an outdoor activity, 2) remember to separately pack sunscreen and then 3) remember to apply the sunscreen, even if the absorbent article is changed during the outing, the kit disclosed by Gallo et al. requires the same mental steps.

For example, the user of the kit disclosed by Gallo et al. must remember to place an absorbent article into the kit, to place sunscreen into the kit, and, most notably, upon removing an absorbent article from the kit for changing purposes the user must still remember to pull the sunscreen out of the kit (just like previously having to remember to pull the sunscreen out of the diaper bag). Gallo et al. provide no teaching or even a suggestion of using the diaper as a reminder to the caregiver to apply sunscreen to the child, such as by directly connecting the sunscreen to the absorbent article.

One skilled in the art would therefore not be motivated by Gallo et al. to releasably secure sunscreen directly to an absorbent article because Gallo et al. fail to recognize the importance of such a securement serving as an automatic reminder to the caregiver, upon changing the absorbent article, to apply sunscreen to the child even though the sunscreen is otherwise wholly unrelated to the absorbent article and its changing process.

The Examiner asserts that "[i]t would have been obvious to one of ordinary skill in the art to modify the assembly of Ehrlich by including a sunscreen composition as suggested by Gallo et al, in order to provide added protection utility to the assembly." See the carry over sentence that spans pages 2 and 3 of the final Office action. Respectfully, the Examiner is using impermissible hindsight to craft such a rejection. The U.S. Supreme Court recently reaffirmed that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon *ex post* reasoning." *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d at 1397. See also *Ex parte Rinkevich*, 2007 WL 1552288 (Bd. Pat. App. & Interf. May 29, 2007).

Following the Supreme Court's guidance provided in *KSR Int'l Co. v. Teleflex Inc.* with respect to impermissible hindsight, a person of ordinary skill in the art having common sense at the time of the invention would not have reasonably looked to Gallo et al. and Ehrlich to solve the problem associated with a caregiver having to remember to apply sunscreen to an infant. Rather, such a suggestion is gleaned only from the present application.

For these reasons, claim 29 is submitted to be nonobvious in view of and patentable over the references of record.

Claims 15, 23, 28, and 29 depend directly or indirectly from claim 29 and are submitted to be nonobvious in view of and patentable over the references of record for at least the same reasons as claim 29.

**VIII. CONCLUSION**

For the reasons stated above, appellants respectfully request that the Office's rejections be reversed and that claims 2-14, 16, 17, 32, and 33 be allowed.

Respectfully submitted,

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Via EFS

**CLAIMS APPENDIX**

15. The pre-packaged arrangement set forth in claim 29 wherein the sunscreen composition comprises at least one of a cream, lotion, oil, gel, foam, sprayable liquid, stick, milk, mousse, tonic and paste.

20. The pre-packaged arrangement set forth in claim 29 further comprising a UV indicator, the absorbent article, the sunscreen carrier, and the UV indicator being arranged for distribution as a single unit.

21. The pre-packaged arrangement set forth in claim 20 wherein the UV indicator changes color upon exposure to UV radiation.

22. The pre-packaged arrangement set forth in claim 20 wherein the UV indicator is secured to at least one of the absorbent article and the sunscreen carrier.

23. The pre-packaged arrangement set forth in claim 29 wherein the absorbent article is a pair of swim pants.

28. The pre-packaged arrangement set forth in claim 29  
wherein the absorbent article is a diaper.

29. A pre-packaged absorbent article and sun protection  
accessories arrangement, said pre-packaged arrangement  
comprising:

an absorbent article for personal wear; and  
a sunscreen carrier containing a sunscreen composition, the  
sunscreen carrier being releasably adhered directly to the  
absorbent article for distribution together as a single unit.

**EVIDENCE APPENDIX**

None.

**RELATED PROCEEDINGS APPENDIX**

None.